IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8551 OF 2004
ALONGWITH
WRIT PETITION NO. 8568 OF 2004

Pankaj Prabhakar Sapkal ...Petitioner

Versus

Radhika Pankaj Sapkal ...Respondent

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Mr. A.V. Anturkar with Ms Vinita Bakre-Shastry, counsel for Petitioner
Mr. R.S.Apte with M.S.Lagu counsel for Respondent.

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CORAM: B. H. MARLAPALLE, J.

DATED OF RESERVING THE ORDER : 30.03.2005

DATE OF PRONOUNCING THE ORDER : 08.04.2005

P. C.:-

1. The petitioner was married to the respondent on 1.1.1997 at Shahad, Taluka Kalyan, Dist. Thane and the marriage was registered with the Registrar of Marriages at Pune on 31.3.1998 as if the marriage had taken place at Pune (Shree Mitramandal Mangal Karyalaya). Though the wife claims that at the time of marriage, she was about 17 years of age, at the time of registration she was shown to be of 21 years of age as against her age being 18 years. From this wedlock they begot a son by name Asim on 28.9.2000. The petitioner approached the Family Court on or about 2.6.2002 and filed P.A. No. 331 of 2002 U/sec. 13(1)(ia) of the Hindu Marriage Act, 1955

("the Act" for short) praying for dissolution of the marriage by a decree of divorce and to exercise visiting rights towards his minor son Asim on every week end and during the school vacations. The respondent wife also approached the Family Court at Pune on or about 30.9.2002 and filed P.A. No. 652 of 2002 for restoration of conjugal rights U/sec. 9 of the Act. She alleged that from 11.4.2002 the husband had abandoned the matrimonial home where she was staying with her in laws, husband and the minor son. Both the petitions were referred to the Counsellor and ex-parte decree of divorce was passed on 5.4.2003 in P.A. No. 331 of 2002. At the same time P.A. No. 652 of 2002 came to be dismissed for default. The wife presented an application on 10.12.2003 for setting aside the orders passed on 7.4.2003 by filing petitions with an application for condonation of delay. The husband filed replies to the said applications and the applications for restoration in both the petitions came to be allowed by the learned Judge of the Family Court at Pune by his order dated 30.7.2004 and this common order has been challenged in these two petitions. Hence, they are being decided by this common order.

2. Mr. Anturkar, the learned counsel for the petitioner husband submitted that consequent to the order dated 2.12.2002 in P.A. No. 652 of 2002 the

wife was directed to remain present in the proceedings filed by the husband as well and though she was aware of this order, she chose to remain absent continuously and thus she was negligent to pursue the petitions filed by her. The petition submitted by the husband was adjourned from time to time and on all dates the wife remained absent. Under such circumstances, the Family Court had no alternative but to proceed further and to pass an ex-parte decree on the basis of the affidavit submitted by the husband. The circumstances need not support the plea of the wife showing ignorance of the dates given by the Family Court and there was no sufficient cause made out to pardon her absence on different dates. The restoration applications suffered from contradictions regarding the knowledge of the ex-parte decree and the stay of the husband with the wife in the matrimonial home in June and July, 2003. The meeting between the parties, if any, was only on account of minor son Asim and there was no reason to believe that even after the decree was passed ex-parte, the husband and wife cohabited in the matrimonial home. There was no reason to believe that the wife received the certified copy of the ex-parte decree from the matrimonial home and all her statements regarding the service of notice were unreliable. The learned counsel further submitted that there was no material to hold that the

petitioner husband played fraud on the Court by obtaining ex-parte decree and it could not be proved that the wife was prevented by the husband from appearing in the Court on the different dates, more so when the wife was staying at Kalyan and was gainfully employed. He, therefore, prayed to set aside the impugned order, in toto.

3. Mr. Apte, the learned counsel for the respondent-wife on the other hand has supported the impugned order restoring both the petitions. At the threshold, he has taken an objection to the maintainability of these petitions and has submitted that the remedy available to the petitioner-husband against the impugned order is by way of a Civil Revision Application. It was further contended by Mr. Apte that the events considered by the learned Judge of the Family Court did make out a case in support of the findings that the petitioner-husband played fraud not only on the wife but indeed on the Court as well and obtained an ex-parte decree of divorce. The husband ensured that the wife could not be in the knowledge of the decree passed, he allowed the statutory period of filing an appeal against the order of decree to be lapsed and after his return from the foreign trip, surreptitiously got married to Shefali Katkar and thus played fraud on the second lady. The reasoning given by the Family Court in

support of the impugned order does not suffer from any error apparent on the face of the record and there is no reason to hold it a perverse order. Hence, there is no case to cause interference under the supervisory powers of this Court under Article 227 of the Constitution. As per Mr. Apte, the petitions are required to be rejected summarily.

4. The Record and proceedings as called for has been received and perused by me. It makes appalling revelations. The Roznama of P.A. No. 331 of 2002 shows that the notice was prepared and sent to the wife on 20.6.2002. On 29.7.2002, the notice was re-issued. On 2.9.2002 the husband filed an application for re-issuing summons to the wife. On 18.11.2003 the husband filed an application for re-issuing the notice. Similar orders are passed on 22.11.2002, 25.11.2002. On all dates right up to 2.12.2002 there was absolutely no indication that the notice was served on the wife and on 4.1.2003 the learned Judge passed an order to proceed ex-parte. On 27.2.2003 the husband was called upon to submit his affidavit and the same was filed on 15.3.2003. On 20.3.2003, the petition was adjourned for arguments to be advanced by the petitioner-husband who had appeared through an advocate. The Counsellor had submitted a report dated 31.3.2003 which reads as under:-

> "I have interviewed the petitioner only. Respondent did not turn up before me. In absence of respondent there is no possibility of reconciliation or any other settlement. Hence necessary order kindly be passed in this case."

5. In his affidavit submitted by way of evidence, the husband reiterated his allegations set out in the petition memo including the illicit relationship of the respondent-wife with the alleged ex boy friend but without naming him. At no point of time, the learned Judge of the Family Court while proceeding to pass an ex-parte decree took note of the fact that the wife was not served with the court notice. At the same time the petition was not filed U/sec. 13(1)(I) of the Act i.e. on the ground of adultery.

6. The observations made by the learned Judge of the Family Court that the claim of the wife that she was not aware regarding the visit of the bailiff to her house are not reliable, and cannot be accepted. The bailiff had in fact served the notice on the father of the husband and obtained his signatures and

thereafter, when he was leaving the house, purportedly a telephone call from the wife was received. The bailiff claimed that the wife talked to him and stated that the notice should be sent on her office address or she would come later and accept the notice. The claim of the bailiff that it was the wife alone to talk to him cannot be relied upon. He had never seen her and he could not be sure that it was the wife on the other hand who was talking to him on phone.

7. The wife in her applications registered as M.A. Nos. 92 and 93 of 2003 set out the details as to how she was kept in dark by the husband about the court proceedings. She was made to believe by the husband that he was not serious in proceeding with the petition he had filed for divorce and that too the court cases would be terminated and they would continue to leave in blissful married life. The wife categorically stated that in the Month of June, July and some part of August, 2003, they stayed together in the matrimonial home. This has not been denied specifically by the husband. This indicated that after obtaining the decree of divorce on 5.4.2003 the husband made the wife to believe that they were still husband and wife and cohabited with her. The court was right in accepting her plea that for the first time in the Month of December, 2003 she came across

the certified copy of the ex-parte decree that was available in the matrimonial home and thus got knowledge of the said decree. On one hand, the husband prayed for ex-parte decree on the ground that the wife was not remaining present and opposing the petition for divorce and on the other hand he had impressed upon the wife that he was not serious in proceedings with the divorce petition and that the court proceedings would be terminated without disturbing or affecting their married life. To this extent, the petitioner-husband can be held to have played a fraud on the court i.e. on insisting before the Court to proceed ex-parte against the wife and pass decree for dissolution of marriage. On perusal of the entire record received from the Family Court, the arguments advanced by the learned counsel for the husband do not commend to me and the reasoning given by the learned Judge of the Family Court at Pune cannot be termed as perverse or manifestly erroneous so as to call for interference in these petitions under Article 227 of the Constitution.

8. Before parting with this order, I must record that the learned Judge of the Family Court proceeded to pass an ex-parte decree in a very casual manner and without verifying the service of notice to the wife. The record speaks for itself and the impugned restoration order though passed rightly, does not in

any way remove the smoke/clouds on the court proceedings. The casual approach of the Court below has devastated the lives of two young women as admittedly the petitioner husband has subsequently married to Shephali Katkar on 10.3.2004 at Mumbai. The normal verification that is required to be done by the Court before proceeding to decide the petition ex-parte could have at least saved this second lady from the trauma, harassment and the insecurity she would suffer. The role played by the Counsellor also does not come up to the expectations in the instant case. The Marriage Counsellors must remember that their role is primarily of Counsellors/Social workers and if they treat their role as a part of their routine official duty, the purpose behind their appointments would be totally defeated. It is high time that an appropriate mechanism for assessment-qualitative and quantitative of the assistance rendered by the Counsellors in doing justice to the spouses is devised at the earliest. The restoration order has provided some solace to the first wife but the procedural negligence on the part of the Family Court has done immense damage to two young ladies.

9. In the premises, the challenge to the common order passed by the Family Court at Pune in Misc. Application Nos. 92 and 93 of 2003 fails and the petitions are therefore, rejected summarily.

10. The Record and Proceedings be returned to the Family Court forthwith. The Registrar (Judicial) is hereby directed to place a copy of this order before the Hon’ble the Chief Justice for inviting His Lordship’s attention to the observations made in paragraph Nos.4 and 8 above.

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